

1  
2 **NOT FOR CITATION**  
3

4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
6

7 RICHARD CESARIN, et al.,  
8 Plaintiffs,  
9 v.  
10 ASBESTOS CORPORATION LIMITED, et  
11 al.,  
12 Defendants.  
13

Case No. 15-cv-06056-HSG

**ORDER GRANTING PLAINTIFFS'  
MOTION TO REMAND**

Re: Dkt. No. 15

Before the Court is the motion to remand filed by Plaintiffs Richard Cesarin and Donna Cesarin (“Plaintiffs”). Dkt. No. 15-18 (“Mot.”). Defendant Asbestos Corporation, Ltd. (“ACL”) removed this action on the grounds of diversity jurisdiction under 28 U.S.C. 1441(b). Plaintiffs argue that remand is proper because ACL removed the action outside of the one-year time limit for removal of diversity actions as prescribed by 28 U.S.C. 1446(c)(1). ACL responds that their untimeliness is excused under 28 U.S.C. § 1446(c)(1) because Plaintiffs acted in bad faith in order to prevent removal by maintaining claims against a non-diverse defendant, despite knowing that those claims were untenable. Dkt. No. 19 (“Opp.”). Plaintiffs reply that the record below shows they actively prosecuted those claims in good faith. Dkt. No. 22 (“Reply”).

The Court has carefully considered the parties’ arguments, both in their briefs and at oral argument. For the reasons set forth below, the Court **REMANDS** this entire action to state court. The parties shall bear their own costs. The Clerk of the Court is instructed to close the file.

**I. BACKGROUND**

This is an asbestos personal injury case. Plaintiffs filed their complaint in the Superior Court for the State of California in the County of Alameda on October 29, 2014. Dkt. No. 1 (“NOR”) ¶ 1 & Ex. A. Plaintiffs named ACL, J.T. Thorpe & Sons, Inc. (“JTTS”), Crown, Cork &

1 Seal, Honeywell International, Inc., and Union Carbide Corporation as defendants. *Id.*

2 ACL removed the entire action on the grounds of diversity jurisdiction on December 24,  
3 2015. *See* NOR ¶ 1; *see also* 28 U.S.C. § 1441(b) (diversity removal). In its removal notice, ACL  
4 acknowledges that removal is facially untimely.<sup>1</sup> NOR ¶ 16; *see also* 28 U.S.C. § 1446(c)(1)  
5 (one-year deadline for diversity removal). But ACL argues that removal is still proper because  
6 Plaintiffs acted in bad faith in order to prevent timely removal. NOR ¶ 17; *see also* 28 U.S.C. §  
7 1446(c)(1) (bad faith exception). Specifically, ACL claims that Plaintiffs discovered they could  
8 not maintain their claims against JTTS, a non-diverse party, during the pendency of the removal  
9 period, but intentionally did not dismiss those claims until removal became untimely. NOR ¶ 17.  
10 As evidence, ACL asserts Plaintiffs failed to take meaningful discovery from JTTS and then  
11 dismissed JTTS from the action six weeks after the removal deadline passed. *Id.* Once JTTS was  
12 dismissed and there was complete diversity, ACL promptly removed the action. *Id.*

13 Plaintiffs now move to remand. They argue that they pursued their claims against JTTS in  
14 good faith at all times. By way of background, Plaintiffs explain that they sued JTTS because of  
15 discovery that Plaintiffs' counsel had acquired in previous asbestos litigation. Mot. at 3-4; Dkt.  
16 No. 15-1 ¶ 2 & Ex. A (materials purportedly showing connection between JTTS and Mr. Cesarin's  
17 asbestos exposure in the 1940s); *id.* ¶ 8 & Ex. K (Plaintiffs' interrogatory response summarizing  
18 the basis of their claims against JTTS). But, under California law, Plaintiffs needed an eyewitness  
19 to establish a nexus between Mr. Cesarin's asbestos exposure and JTTS. Mot. at 1; Opp. at 1-2.<sup>2</sup>  
20 Mr. Cesarin testified at deposition that he had never heard of JTTS, so he could not provide that  
21 link. Dkt. No. 15-1 ¶ 9 & Ex. M (deposition excerpts). Plaintiffs contend that they were never  
22 able to locate an eyewitness and, when JTTS prompted them about this issue shortly before  
23 dispositive motions were due, they agreed to voluntarily dismiss the claims. Mot. at 9.

24 In its opposition, ACL clarifies that its position is not that Plaintiffs sued JTTS in bad faith,  
25

26 <sup>1</sup> ACL also argued in its removal notice that it had a tolling agreement with Plaintiffs, NOR ¶ 16,  
27 but it has apparently abandoned that argument in opposition to Plaintiffs' motion to remand.

28 <sup>2</sup> Both parties agree that California law requires some form of personal testimony establishing a  
nexus between an asbestos plaintiff and the defendant responsible for that exposure. *See generally*  
*Weber v. John Crane, Inc.*, 143 Cal. App. 4th 1433 (2006) (detailing the nexus requirement).

1 but that they maintained their claims against JTTS in bad faith by never pursuing an eyewitness.  
2 Opp. at 2, 9. ACL argues that Plaintiffs' counsel knew from the inception of the litigation that Mr.  
3 Cesarin did not know anything about JTTS, as evidenced by their failure to pose any questions  
4 about JTTS to Mr. Cesarin during his preservation deposition that occurred on June 12, 2015.  
5 Dkt. No. 19-1 ¶¶ 2-3 & Ex. A (deposition excerpts). Despite that glaring deficiency, Plaintiffs  
6 never demanded a single discovery response from JTTS that would help prove their claims. The  
7 only exception, ACL claims, is the interrogatories that are deemed served on each defendant with  
8 any asbestos complaint. Dkt. No. 19-1 ¶ 4 & Ex. C; Ala. Super. Ct. L.R. 3.285(b). But JTTS  
9 never served any responses and, apart from sending a meet-and-confer letter that was apparently  
10 ignored, Plaintiffs never took any action to obtain those responses. *Id.* ¶ 4.

11 Plaintiffs argue that they never pursued formal discovery from JTTS because there was no  
12 chance that it had any additional, relevant information that they did not already have. Reply at 5.  
13 Instead, Plaintiffs relied on informal discovery conducted by private investigators to identify a  
14 possible eyewitness. *See id.* at 9 ("Unfortunately, Plaintiffs' investigators were unable to find a  
15 witness to link J.T. Thorpe's work at PABCO to Mr. Cesarin in terms of specific exposure and  
16 proximity[.]"). At oral argument, Plaintiffs reiterated that they relied on private investigators.

17 The Court subsequently ordered Plaintiffs to submit a supplemental declaration detailing  
18 the efforts of their private investigators to locate any evidence that would tie JTTS to Mr. Cesarin.  
19 Dkt. No. 23. Plaintiffs did so. Dkt. No. 24 ("Supp. Decl."). Plaintiffs' counsel declares under  
20 penalty of perjury that he asked his private investigator "to conduct an investigation directed at  
21 finding other [] plant workers who might have information about [JTTS] and ACL[.]" *Id.* ¶ 11.  
22 To do so, they used a directory from the 1940s that states the names of the residents in the town  
23 where Mr. Cesarin worked and their employers. *Id.* ¶ 12 & Ex. B (exemplar from the directory).  
24 Plaintiffs' counsel avers that "[b]etween May and November 2015, our investigator continued to  
25 try and locate potential coworkers who might be alive and have pertinent information." *Id.* ¶ 13.  
26 For his part, Plaintiffs' investigator, Brian Williams, declares that "[i]n Fall 2015, [he] contacted  
27 [h]is previous employer . . . on a number of occasions and spoke to some old coworkers to see  
28 what information they had in their files for [the plant at which Mr. Cesarin worked]." Dkt. No.

1 24-1 ¶ 4. They had no additional information. *Id.* “By November 2015, [he] had exhausted [his]  
2 search for living witnesses and had come up empty.” *Id.* ¶ 5.

3 **II. LEGAL STANDARD**

4 A defendant may remove a state court action to federal court on the basis of diversity of  
5 citizenship. 28 U.S.C. § 1441(b); *see also id.* § 1332. In general, a defendant may not remove an  
6 action on the basis of diversity jurisdiction “more than one year after the commencement of the  
7 state court action.” *Id.* § 1446(c)(1); *see also Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 688 (9th  
8 Cir. 2005) (holding that “commencement” in this context refers to when the action was initiated in  
9 state court, according to state procedures). But untimely removal is warranted where “the plaintiff  
10 has acted in bad faith in order to prevent a defendant from removing the action.” *Id.* Because “the  
11 removing defendant has always borne the burden of establishing federal jurisdiction,” *Abrego*  
12 *Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 682-83 (9th Cir. 2006) (internal quotation omitted),  
13 the defendant bears the burden of proving that the plaintiff acted in bad faith, *see id.* at 685 (where  
14 the removal statutes are silent as to burden allocation, the general rule applies).

15 **III. DISCUSSION**

16 There is no dispute that ACL’s removal of this diversity action was facially untimely. The  
17 only issue is whether Plaintiffs acted in bad faith to prevent removal within the statutory window.<sup>3</sup>

18 The Ninth Circuit has not yet instructed district courts how to apply the bad faith provision  
19 set forth in 28 U.S.C. § 1446(c)(1). *See In re Boston Scientific Corp.*, No. CV 15-6666, at \*5  
20 (C.D. Cal. Sept. 29, 2015) (noting the absence of Ninth Circuit authority); *NKD Diversified Elecs., Inc. v. First Mercury Ins. Co.*, No. 1:14-CV-00183, 2014 WL 1671659, at \*3 (E.D. Cal. Apr. 28,  
21 2014) (same); *see also Ehrenreich v. Black*, 994 F. Supp. 2d 284, 288 (E.D.N.Y. 2014) (the bad  
22 faith provision was added as part of the Federal Courts Jurisdiction and Venue Clarification Act of  
23 2011). The Court has also been unable to locate any precedent from other courts in this district.

24 Given the temporal exigencies of this case,<sup>4</sup> the Court will not elucidate a general standard

25  
26  
27 <sup>3</sup> Because the Court finds that ACL did not meet its burden of showing bad faith, there is no need  
28 to reach the question of whether ACL obtained the consent of all defendants before removal.

<sup>4</sup> The parties stipulated to have this motion heard on a substantially expedited schedule in light of  
Mr. Cesarin’s terminal medical condition. *See* Dkt. No. 17-1. Barring quick action, there is an

1 that controls the bad faith provision. Instead, the Court makes only a summary finding that should  
2 not be used as precedent in other matters going forward. For that reason, the Court designates this  
3 order as not for citation under Civil Local Rule 7-14.

4 The Court finds that ACL has not met its burden of showing that Plaintiffs acted with bad  
5 faith such that the untimely exercise of federal diversity jurisdiction is warranted. It is undisputed  
6 that Plaintiffs sued JTTS in good faith based on previous discovery in other litigation, as counsel  
7 for ACL agreed during oral argument. The issue is whether there is any evidence that Plaintiffs, at  
8 some point after suing JTTS but before the end of the removal period, decided to maintain their  
9 action against JTTS solely to destroy complete diversity. The only evidence of bad faith that ACL  
10 proffers is that Plaintiffs (1) failed to take meaningful formal discovery from JTTS and (2) agreed  
11 to voluntarily dismiss JTTS from the action after the passage of the removal deadline. Unrebutted,  
12 this evidence might be sufficient to show bad faith. But the Court need not reach that question  
13 because Plaintiffs have submitted a declaration from counsel and from their private investigator  
14 averring that they continued to search for an eyewitness that could save their case against JTTS.  
15 Under the circumstances, these affirmations by counsel and the investigator regarding their efforts  
16 to obtain the key evidence they lacked suffice to defeat Defendant's bad faith claim.

17 **IV. CONCLUSION**

18 For the reasons set forth above, the Court hereby **REMANDS** this entire action back to the  
19 Superior Court of California for the County of Alameda. The parties shall bear their own costs.  
20 The Clerk of the Court is instructed to close the file.

21  
22 **IT IS SO ORDERED.**

23 Dated: February 24, 2016

24  
25   
26 HAYWOOD S. GILLIAM, JR.  
27 United States District Judge

28 undisputed risk that Mr. Cesarin will not survive a trial, whether in state or federal court.